In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1127

COOLEY C. BERRY, PETITIONER

v.

THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was a Lieutenant Colonel in the Air Force at the time of his retirement on July 2, 1963. Pursuant to Section 10 of Pub. L. 86-616, July 12, 1960 (74 Stat. 386, 395) (sometimes referred to as the "White Charger" Act), which expired by its own terms on June 30, 1965, petitioner was selected for retirement effective June 30, 1963. However, the petitioner was examined by a Physical Examination Board on April 18, 1963, and was found physically unfit for duty with a permanent disability of thirty

per cent. This Board recommended permanent retirement on the basis of its findings of physical disability. The petitioner concurred in the recommended findings of the Physical Evaluation Board, and he expressly declined to demand a formal hearing or to submit rebuttal (Record p. 30). Thereupon the Physical Review Council found petitioner's disability permanent at thirty per cent and recommended that he be retired pursuant to 10 U.S.C. 1201. On June 18, 1963, orders were issued retiring petitioner under 10 U.S.C. 1201 and 1372, effective July 2, 1963.

Petitioner subsequently brought this action in the Court of Claims alleging that he was retired under Pub. L. 86-616 (the "White Charger" Act) and that this statute was unconstitutional. The Court of Claims granted summary judgment for the government on the ground that petitioner "was retired for physical disability, with his concurrence, and was not retired under" the "White Charger" Act. *Infra*, p. 4.[1]

This decision was plainly correct and in no event presents an issue of general application warranting review by this Court. The certified records of the Department of the Air Force conclusively show that petitioner was retired under 10 U.S.C. 1201 and 1372 for physical disability. Petitioner's attack upon the constitutionality of the "White Charger" Act is academic. Even if there were some doubt of the consti-

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[1] Since petitioner has not printed the decision of the Court of Claims we have set it forth *infra*, p. 4, for the convenience of this Court.

tutionality of that Act, the Air Force clearly had authority to order petitioner to take a physical examination; upon a proper finding of physical disability, it was fully authorized to cause his retirement for such disability. Since there was no question of fact to be determined at trial, the Court of Claims properly granted the motion for summary judgment.[2]

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

APRIL, 1966

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[2] Petitioner objects to the Court of Claims' disposition of this case without argument or opinion. The Court's order, however, distinctly stated its reason for dismissing the petition, and the Court's rules provide that motions for summary judgment may be acted upon without argument. Ct. Cl. Rule 65(b)(2). Petitioner was not entitled to oral argument on the motion for summary judgment where, as here, only a narrow issue of law was presented. See *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 274-277. Cf. *Londoner* v. *Denver*, 210 U.S. 373.

APPENDIX

IN THE
UNITED STATES COURT OF CLAIMS

No. 331-64

COOLEY C. BERRY

v.

THE UNITED STATES

ORDER

This case comes before the court on defendant's motion for summary judgment. Upon consideration thereof, together with the opposition thereto and the briefs of the parties, and without oral argument, it is concluded that plaintiff was retired for physical disability, with his concurrence, and was not retired under the Act of July 12, 1960, and,

IT IS ORDERED that defendant's motion for summary judgment be and the same is granted and plaintiff's petition is dismissed.

BY THE COURT

JAMES R. DURFEE
Acting Chief Judge

July 12, 1965

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